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Nos. 90-926, 90-966

In The

Supreme Court of the United States

October Term, 1990

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

and

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENTS HOVER TRUCKING COMPANY AND FEDERAL RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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ARGUMENT

A. The ICC Did Ignore the Bad Faith Factor in Order to Expand its Jurisdiction, and Eliminate State Regulation of Intrastate Transportation.

The Federal Respondents do not dispute the proposition, advanced by Intervenors, that the ICC has publicly proclaimed to Congress that continued state economic regulation of for-hire truck transportation is counterproductive, and totally at odds with the preferable "Brave New World" of unfettered competition which the ICC has overseen during the 1980's in this industry. This agency has proudly announced to Congress that it has done all that it can, to contract state regulation, and urged the legislature to take the ultimate step – preempt intrastate regulation. As Congress has refused to take this step, the agency has been left to creative expansion of its jurisdiction vis-a-vis the states, to fulfill the ICC's own deregulation agenda. That is what has occurred in the *Hover* case, no matter what gloss the Federal Respondents seek to place upon it.

This can best be seen in the strained analysis presented by Respondents on the bad faith issue. Again and again, bad faith evidence, or the lack thereof, was pointed to as the critical factor, by both the ICC itself and the reviewing courts. Yet, in this case, the ICC stated that "bad faith" was no longer important, as long as the criteria established in *Pennsylvania Public Utilities Commission v. Arrow Carrier Corporation*, 113 MCC 213 (1971), aff'd *per curiam* 415 U.S. 902 (1974), are met. There is no case which supports this proposition, including those very cases brazenly cited by the Federal Respondents in their Brief in Opposition.

The case of *Rock Island Motor Transit Company v. Watson-Wilson Transportation System*, 99 MCC 303 (1965), aff'd *sub. nom. Rock Island Motor Transit Co. v. United States*, 256 F.Supp. 812 (S.D. Iowa, 1966), heavily relied upon by

Respondents, is most instructive on this issue. In *Rock Island*, the ICC stated, at 99 MCC 316, that:

> Nor does *any* other evidence point to subterfuge. Indeed, it points the other way. As nearly as we can tell from this record, the operation was begun innocently more than a generation ago, with no subterfuge intended on (Respondent's) part and none feared by petitioners or intervenor. (Emphasis supplied).

This Hover operation was not begun a generation ago. It was begun in 1983, when Hover was not "a far-larger single-line carrier operating in six states" (Federal Respondents' Brief, 12)[1]. Hover never established that it had these operations when it moved about ten miles from Niles, Michigan to South Bend, Indiana. Further, with regard to the ICC's conclusion that South Bend was a logical choice, given the six-state area (Federal Respondents' Brief, 12), that area had nowhere near the level of Hover service in 1983, when its decision was made. Further, it moved about ten miles. Niles, Michigan is just as logical as South Bend, Indiana, even assuming a six-state area of operations. The move was made by Hover to avoid Michigan regulation. Hover's Michigan activity remains the important financial center of its operations. Bad faith was an issue in *Rock Island*. There was no evidence of bad faith presented there. On the other hand, the instant record is rife with evidence of bad faith.

On review, in *Rock Island, supra*, the three-judge district court differentiated the facts before it with other proceedings where a subterfuge had been established, by noting that bad faith present in the other proceedings was

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[1] Hover cannot be described as a single-line carrier in any event. Much of its traffic is handled on an interline basis with other carriers, and even picked up and delivered on its own line by agents possessing their own ICC authority.

not present in the facts before the ICC[2]. The Iowa-to-Iowa shipments in *Rock Island*, further, were only a minute fraction (less than 1%) of the traffic handled by the involved carrier from the questioned Iowa points, including both intrastate and interstate traffic[3]. The same is not true here.

In *Missouri Public Service Commission v. Missouri Arkansas Transportation Company*, 103 MCC 641 (1967), again cited in Federal Respondents' Brief at 12, the ICC again relied heavily on the absence of direct evidence of bad faith. As was there stated, at 103 MCC 646.

> If defendant's actual routing and method of handling the considered traffic originating at or destined to a point in Missouri through Kansas, although for its convenience, appears operationally reasonable, *and absent evidence from which we can independently infer bad faith on defendant's part*, we have no alternative but to decide this question in its favor. (Emphasis supplied).

The ICC emphasized that "*no facts*" had been established from which bad faith could be inferred. See 103 MCC at 647 (Emphasis supplied).

Other cases cited by the Federal Respondents held similarly. In *Jones Motor Co. v. United States*, 218 F.Supp. 133 (E.D. Pa. 1963) petition for reh. den., 223 F.Supp. 835, aff'd *sub. nom., Highway Express Lines v. Jones Motor Co.*, 377 U.S. 217, 84 S.Ct. 1244, 12 L.Ed.2d 292 (1964), the three-judge district court noted initially at 218 F.Supp. 137 that:

> *no direct evidence of bad faith* was offered by the P.U.C. (Emphasis supplied).

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[2] 256 F.Supp. at 817.

[3] 256 F.Supp. at 816, n.5.

The lack of evidence of bad faith, in denying the rehearing, was again underscored[4]. In still another case, *Tri-D Truck Lines, Inc. v. ICC*, 303 F.Supp. 631 (D. Kan, 1969), the three-judge district court analyzed the evidence in detail, in order to conclude that there was no bad faith on behalf of the respondent carrier.

The Federal Respondents continue to ignore all of this language, as well as the emphasis of bad faith in those several cases which found that a carrier had abused its ICC certificate[5]. All of this language is ignored by Federal Respondents. It is overlooked, precisely because the decision below cannot be squared in any respect with these past cases, including, most importantly this Court's decision in *Service Storage & Transport Co., Inc. v. Virginia*, 359 U.S. 171, 175, 79 S.Ct. 714, 3 L.Ed.2d 717 (1959), wherein it was written by Justice Clark, for a unanimous Court, in commenting on the Commonwealth of Virginia's case,

> However, it offered *no direct evidence of bad faith* on the part of petitioner in moving its traffic through Bluefield, West Virginia. (Emphasis supplied).

Yet, the ICC, in the *Hover* case, considered none of the bad faith evidence as outlined by Intervenors in their Petition, other than the statement by Hover's President to a newspaper reporter that, through moving its facilities to

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[4] 223 F.Supp. at 236.

[5] *Service Trucking Company, Inc. Petition for Declaratory Order*, 94 MCC 222, 225-226 (1963), aff'd *sub. nom., Service Trucking Co. v. United States*, 239 F.Supp. 519 (D.Md., 1965), aff'd 382 U.S. 43, 86 S.Ct. 183, 15 L.Ed.2d 36 (1965); *Pennsylvania Public Utility Commission v. Leonard Express*, 107 MCC 451, 459-463 (1968), aff'd *sub. nom., Leonard Express, Inc. v. United States*, 298 F.Supp. 556 (W.D.Pa., 1969); and *Haley, Public Utility Commissioner of Oregon v. City Transfer & Storage Co.*, 112 MCC 80, 92-94 (1970).

South Bend from Niles in 1983, Hover could serve the State of Michigan without holding authority from the MPSC (Intervenors' Appendix, 14a). Even that motivational statement was cavalierly dismissed by the ICC, with the comment that:

> In any event, motivation is not relevant here because the criteria set forth in *Arrow, supra,* have been met.

(Intervenors' Appendix 25a-26a). The ICC's rejection of bad faith, as a factor, when the *Arrow* test has been fulfilled cannot be reconciled in any respect with the earlier statement by this Court in *Service Storage* as well as other federal court and ICC pronouncements on the analysis of these issues.

This ruling in *Hover,* was more than a throw-away line, or, as Federal Respondents assert here, "an alternative ground." Federal Respondents' Brief, 15. It is telling of the ICC's jurisdictionally expansionist analysis of all of the evidence here – if the evidence detracted from a finding that the Hover traffic was interstate in nature, it was not considered.

For example, the ICC did not consider the fact that Hover transported this traffic directly between Michigan points in normal routine operations without involving South Bend, until it was apprehended. Only after being caught was this practice discontinued. This establishes bad faith, just as the submission of a false affidavit by Hover's President to the MPSC in the state complaint proceeding establishes bad faith. He indicated in that affidavit that all traffic was moving through South Bend, when Hover later admitted that such traffic was not moving through South Bend on a "normal, routine" basis. The ICC did not consider these critical factors, unnecessary in its view, because the *Arrow* factors had been met. This is a tortured application of past precedent.

The handling of this Michigan traffic directly by Hover is vitally important. It was more than "some" traffic. Federal Respondents' Brief, 14, n.8. Also, Hover

established procedures to prevent this, only as part of the resolution of a complaint proceeding brought against it by the MPSC. Moreover, Hover has manipulated these procedures, so that it can serve Michigan points only 23 miles distant (Detroit and Pontiac, a northern Detroit suburb) through South Bend when Hover's Pontiac and Detroit terminals have peddle runs longer than 23 miles themselves. The ICC gave the bad faith evidence no significance, because it had ruled the bad faith factor out of existence. This was not justified under *Service Storage* or any other past precedent. It was this flawed analysis by the ICC that lead Judge Welford to comment, in dissent below that:

> I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation.

(Intervenors' Petition, 15a). Even the majority below was "given pause" by the ICC's treatment of bad faith. (Intervenors' Petition, 8a). Contrary to the majority's conclusion, however, the ICC did not consider all of the bad faith evidence, as the ICC commented only on the admission to the newspaper reporter, and not on the myriad of other facts establishing bad faith (Intervenors' Petition, 17-19). The decision of the ICC was crafted with one end in mind – to establish ICC jurisdiction over the Hover traffic. It should not be allowed to trample upon the facts and the law, to interfere with what is still a legitimate state function, the economic regulation of intrastate truck transportation.

B. The Arrow Analysis by the ICC Below was also Novel, and Designed to Approve Virtually any Less-Than-Truckload Operation Conducted Under an ICC Certificate Through a Point in Another State.

The Federal Respondents contend that the ICC properly analyzed the facts of this case, in line with *Arrow, supra.* (Federal Respondents' Brief, 13, 15-16). What the ICC did, however, was once again shove the Hover facts into an *Arrow* vessel in which they do not fit.

On the issue, for example, of operational justification, the ICC did not take into account the past Hover direct routings which avoided South Bend. The ICC never addressed the question of why Hover moved LTL traffic directly between its Michigan terminals on a "normal, routine" basis. The question was avoided, because the answer is necessarily at odds with the ICC's ultimate conclusion below. The answer is that Hover made the clear judgment in the past that the routing of such traffic through South Bend was unnecessary, and not reasonable, logical and normal. It made sense, from an operational and economic standpoint, to leave this traffic on a normal, routine basis in Michigan, and route line-hauls directly between the Hover Michigan terminals, all capable of processing LTL traffic. Instructions were given to Hover personnel in Michigan to route traffic directly on a normal, routine basis. This admission by Hover that the South Bend routing was illogical was not considered by the ICC. Neither was other evidence considered, such as alternative, available methods of tying the Hover Michigan facilities together with simple line-haul routings which would take advantage of load factors on Michigan traffic; or the economic analysis of Intervenors' expert Mr. Glenn Fast that Hover's routings through South Bend were costly and inefficient. The ICC was not distracted by the facts from its ultimate goal of finding that the Hover handling of Michigan-to-Michigan freight was interstate in nature.

Along these very lines, it was necessary for the ICC to concoct a new circuity test, and consider traffic not at issue in this case, so that the circuity factor could be reduced to a level that the ICC could brush aside as inconsequential. Unlike *Gray Line Tour Co. v. ICC*, 824 F.2d 811 (9th Cir., 1987), cited by Federal Respondents, these packages receive no aesthetic benefit from visiting a freight dock in South Bend, Indiana. These shipments could be handled similarly on a direct basis at Hover's extensive (and ever-growing) network of terminal facilities in Michigan, as such shipments were handled directly by Hover in the past on a normal, routine basis. A new circuity method of analysis had to be devised by the ICC in this case, because never before had it considered a scheme of the magnitude confronted in this case, involving as it does Hover service on Michigan-to-Michigan traffic for the entire lower peninsula.

Recognizing also that it was considering non-issue traffic to reduce the circuity numbers, the ICC felt constrained to say that circuity was not important anyway, when analyzing LTL freight operations. Neither *Rock Island* nor any other past case supports this proposition. For the ICC, as an administrative agency, to depart from past tests, it must articulate clearly its reasons for that departure, as opposed to merely ignoring the plain language of its past decisions and those of the courts, as it has done in this case.

Circuity is a major factor in analyzing LTL operations, as well as in other cases. As the ICC itself stated in *Arrow, supra*, at 113 MCC 220, "No single factor is controlling. Nor is there any presumption in favor or against any one". *Arrow* involved an analysis of LTL freight. The ICC changed the rules below, not only on bad faith, but on circuity. It did so, to expand its jurisdiction, vis-a-vis the states. This is an unjustified course of action, unauthorized by any legal theory.

CONCLUSION

The issue in *Hover* before the ICC was not whether its regulatory policies were more intelligent than those of the State of Michigan. The issue was whether the respondent carrier had unlawfully used its ICC certificate as a subterfuge in providing a service on traffic having both a Michigan origin and Michigan destination. Further, the ICC should have analyzed the facts below in accordance with past precedent of this Court, other federal courts, and the Commission itself. It did not do so. That the ICC is convinced of the wisdom of its de-regulatory policies is made clear, by cases such as *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 111 L.Ed.2d 94, 58 U.S.L.W. 4862 (1990). That does not mean that the regulatory course chosen by the ICC is legally justified, however, as this Court noted in *Maislin*. It is up to Congress, and not the ICC, to expand ICC jurisdiction over intrastate transportation if that is to come. The ICC must not be allowed to expand its jurisdiction in the fashion which it has here. Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

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Respectfully submitted,

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